STATE OF MICHIGAN

COURT OF APPEALS

JUNE UMBARGER, Personal Representative of the Estate of ORPHA TOWER,

Plaintiff-Appellant,

v

HAYES GREEN BEACH MEMORIAL HOSPITAL CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 1, 2007

No. 264699
Eaton Circuit Court
LC No. 04-001695-NO

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendant. We affirm.

Plaintiff's mother died as a result of complications of blunt force injuries sustained when she fell from her hospital bed. In her complaint, plaintiff alleged that defendant failed to provide adequate nursing staff and security personnel, failed to provide bed rails or "hand grabs" in decedent's room, failed to adequately assess the decedent, failed to perform necessary nursing interventions, failed to notify physicians of significant changes, failed to treat or intervene appropriately and negligently assigned nursing care functions to persons lacking appropriate education or experience. The complaint identifies plaintiff's cause of action as sounding in "negligence." The circuit court granted defendant summary disposition pursuant to MCR 2.116(C)(7), holding that plaintiff's claim sounded in medical malpractice and that the statute of limitations for such claims expired before plaintiff commenced this action.

This Court reviews a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(7) de novo, accepting as true the contents of the complaint unless specifically contradicted by affidavits or other appropriate documents. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

Plaintiff first argues that the trial court erred in concluding that her claims sounded solely in medical malpractice and not ordinary negligence. We disagree.

In *Bryant*, *supra* at 422, our Supreme Court set forth the following test to determine whether an alleged negligent act sounded in medical malpractice or ordinary negligence:

> [A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

Plaintiff conceded below that her "claim pertains to an action that occurred within the course of a professional relationship." As for the second prong of the *Byrant* test, plaintiff's allegations that defendant failed to adequately monitor the decedent and provide adequate staff to prevent a fall or an assault "raise[] questions of medical judgment beyond the realm of common knowledge and experience," and thus present claims sounding solely in medical malpractice. *Id.* at 426-427; *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). Whether bed rails should have been used is also a question of medical judgment. See *Waatti v Marquette General Hosp, Inc*, 122 Mich App 44, 49; 329 NW2d 526 (1982).[1] Similarly, the decision whether to equip the decedent to get out of bed unassisted also involves issues of medical judgment beyond the experience of lay jurors. Plaintiff argues that the allegation that nursing staff witnessed the decedent fall but failed to act to prevent it raised an issue of ordinary negligence. However, plaintiff has not cited to any pleading, transcript or document in the record that would show that she asserted below that defendant's staff had an opportunity to intervene to prevent decedent's fall, but declined to do so. Notably, the assertion that staff witnessed the fall, had an opportunity to respond and prevent injury, and failed to do so is absent from plaintiff's complaint, which alleges solely that staff witnessed the fall after hearing the decedent moaning. This Court need not consider assertions made by a party when the party fails to provide record support for those assertions. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Further, although plaintiff asserts that the allegation that staff may have physically abused plaintiff raised an issue of ordinary negligence, it is axiomatic that physical abuse is an intentional tort.[2]

Plaintiff also argues that the circuit court erred in dismissing her action because defendant did not argue that plaintiff's claim sounded solely in medical malpractice until it filed its reply to plaintiff's brief opposing summary disposition. However, defendant's motion for summary disposition has as its premise that plaintiff's claims sound only in medical malpractice,

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[1] The alleged communication by plaintiff to defendant's staff about the bed rails does not transform this medical malpractice claim into a claim of ordinary negligence. Nor does plaintiff's comment to defendant's staff that the decedent was "frisky' and needed bedrails demonstrate a "known risk of imminent harm" analogous to observing a patient asphyxiating between bed rails and a mattress and taking no corrective action. *Bryant, supra* at 430-431

[2] The complaint did not expressly raise any intentional tort claims, nor did plaintiff argue that summary disposition would be improper because plaintiff raised an intentional tort claim. Further, the complaint did not allege that defendant should be liable because staff abused the decedent but because security personnel negligently failed to prevent an assault, which concerns patient monitoring.

an assertion to which plaintiff plainly responded in her answer to that motion. Plaintiff argued at length in both her brief opposing summary disposition and during oral argument on defendant's motion that that her claims sounded in both medical malpractice and ordinary negligence. Moreover, the record does not support plaintiff's allegation that she had no opportunity to respond to the argument that her claim sounded solely in medical malpractice. The trial court recessed the proceedings to provide plaintiff's counsel with an opportunity to read the reply brief. After the recess, counsel stated that she read the reply brief and she did not raise any objections to it. If counsel needed more time to read or respond to the brief or if she believed the trial court should have considered the brief untimely she should have asserted as much at that point in the proceedings. She did not do so.

In addition, plaintiff argues she should be allowed to amend her complaint to distinguish between her general negligence and medical malpractice claims by placing them into separate counts. Although leave to amend a complaint should be granted whenever justice so requires, leave to amend need not be granted if amendment would be futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). The amendment suggested to this Court by plaintiff would be futile because, even if plaintiff were allowed to subdivide her allegations as indicated, regardless how they were titled or characterized in the complaint, plaintiff's claims sound solely in medical malpractice for the reasons explained above.

Citing *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled in pertinent part by *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), plaintiff next argues that the statute of limitations did not bar her medical malpractice complaint. We disagree. It is undisputed that the two-year statute of limitations generally applicable to medical malpractice, MCL 600.5805(6), lapsed before plaintiff filed her claim.[3] Plaintiff argues that, despite this, her notice of intent saved the claim. However, it is now settled that although the notice-tolling provision in MCL 600.5856 can toll the statute of limitations generally applicable to medical malpractice, the tolling provision cannot toll the wrongful death saving provision found in MCL 600.5852. *Waltz, supra* at 644; *Farley v Advanced Cardiovascular Health Specialists PC*, 266 Mich App 566, 574; 703 NW2d 115 (2005). Further, this Court has determined that *Waltz* applies retroactively. *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 507; 722 NW2d 666 (2006). Accordingly, plaintiff's arguments that her claim was timely and that *Waltz* does not apply must fail.

Plaintiff next asserts that retroactive application of *Waltz* offends federal and state due process requirements. Because plaintiff did not present this argument below, it is not properly presented for appeal. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). In any event, this argument lacks merit. *Farley, supra* at 576 n 27.

Finally, plaintiff argues that the circuit court should have applied the doctrine of judicial tolling to toll the statute of limitations here. However, this Court recently held that "judicial

[3] The decedent died on April 20, 2002. Plaintiff filed her first complaint on December 28, 2004, without an affidavit of merit, and filed a second complaint with the required affidavit on February 10, 2005.

tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*'s time restraints." *Ward v Siano,* ___ Mich App ___; ___ NW2d ___ (2006), slip op p 3.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette